



County of San Bernardino
Office of the District Attorney
JASON ANDERSON, District Attorney
Appellate Services Unit

October 25, 2019

Via U.S. Mail and Email

Mr. Christopher Damien
The Desert Sun
750 N. Gene Autry Trail
Palm Springs, CA 92264
christopher.damien@desertsun.com

Re: Your California Public Records Act Requests
Death of Kenneth Paul Munoz
Death of Merlin Factor

Mr. Damien:

As I noted previously via email, the San Bernardino County District Attorney's Office has received your California Public Records Act (CPRA) requests for records related to the deaths of Kenneth Paul Munoz Jr. and Merlin Factor.

Documents Being Released With at this Time

Pursuant to your request, we are releasing the following records now, via email:

- Press Release re: Munoz
- Press Release re: Factor
- Public Memorandum re: Munoz
- Public Memorandum re: Factor

Because these items already exist in electronic form, there is no charge for sending them via email.

General Assertion of Attorney Work-Product and Official Information Privileges

The attorney work-product privilege is recognized in civil and criminal law. (Code Civ. Proc., § 2018.030; Pen. Code, § 1054.6.) It constitutes an exemption to the release of records under the CPRA. (See *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176.)

The attorney work-product privilege absolutely shields an attorney's "impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).) It offers a qualified privilege for all other work product. (Code Civ. Proc., § 2018.030, subd. (b).) It includes work performed by non-attorneys on the attorney's behalf. (See *Meza*

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v. H. Muehlstein & Co., Inc. (2009) 176 Cal.App.4th 969, 977, quoting *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1256–1254, fn. 4.)

In addition, internal records fall within the official information privilege (Evid. Code, § 1040) and the deliberative process privilege (see *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 169–173; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1341).

The District Attorney asserts the attorney work-product, official information, and deliberative process privileges to any and all internal records to which those privileges apply,¹ except those which must be disclosed, as described below.

Additional Documents Related to Kenneth Paul Munoz

Despite repeated searches, the physical Munoz file has not been located. It is therefore impossible to release any further records related to that case.

Additional Documents Related to Merlin Factor

The physical Factor file has been located and reviewed. I have made a preliminary determination that it contains records that are subject to release under the CPRA and Penal Code section 832.7, subdivision (b)(1)(A). Release would be compelled by those code sections; the District Attorney does *not* elect to release records that are exempt from disclosure. (See Gov. Code, § 6254.5.) Although the District Attorney presumes that you have a legitimate journalistic purpose in requesting these records, we cannot consider your motives, whether they be good, bad, or otherwise. (Gov. Code, § 6257.5; *Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 242 (LAUSD).)

Notice to Involved Deputies

The California Constitution recognizes that privacy is an inalienable right. (Art. I, § 1.) It also recognizes a right of public access to public records, while maintaining the confidentiality of law enforcement and prosecution records. (Art. I, § 3, subds. (b)(1), (b)(5).) The CPRA recognizes the need to be mindful of individual privacy. (Gov. Code, § 6250.)

Any time a government file contains “information which applies to a particular individual,” that individual’s privacy interests must be considered, under Government Code section 6254, subdivision (c). (LAUSD, *supra*, 228 Cal.App.4th at p. 239, quoting *Dept. of State v. Washington Post Co.* (1982) 456 U.S. 595, 602.) When considering both personal privacy and the catchall exemption of Government Code section 6255, subdivision (a), related to

¹ The two memoranda which are being released would ordinarily constitute attorney work-product, but the District Attorney has elected to publicly release them. Internal variants of those memoranda, containing the full names of witnesses, et cetera, will not be released.

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the public interest, the public's right to access records must be balanced with the individual's right to privacy, and the public interest in disclosure balanced against the public interest in nondisclosure. (*LAUSD*, at pp. 238, 240.)

The purpose of the CPRA is "to open agency action to the light of public review" in order to significantly contribute to public understanding of the operations or activities of government. (*LAUSD*, *supra*, 228 Cal.App.4th at p. 241, quoting *U.S. Dept. of Justice v. Reporters Committee* (1989) 489 U.S. 749, 775.) As a threshold matter, "the records sought must pertain to the conduct of the people's business." (*LAUSD*, at p. 242.) Once that threshold is reached, the weight of the interest in disclosure must be considered—it is "proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate." (*Ibid.*, quoting *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 616.)

In *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250, 1261 (*Marken*), a case where a teacher's personnel records were sought, the Court of Appeal recognized the conflict between the right to privacy and the right to public records. A person whose records are being sought may bring a "reverse-CPRA action" in court, to assert their privacy rights and challenge the release of documents. (*Id.* at pp. 1264–1271.)

An individual wishing to bring a reverse-CPRA action can only do so with notice from the agency that is preparing to release records. In *Marken*, *supra*, 202 Cal.App.4th at p. 1257, the school district delayed disclosure of records for one month, in order to permit Marken to challenge the decision in court.

In light of the inalienable nature of the right to privacy,² the Sheriff's Deputies who are the subject of these reports will be given notice of my preliminary determination that these records should be released. They will be provided a month to initiate a reverse-CPRA action, should they choose to do so.

Records to Be Released, if No Reverse-CPRA Action Is Filed

Redacted Police Reports and Related Records

After removing pages where the entire page would be redacted, 245 pages of reports remain. They will be redacted in accordance with Penal Code section 832.7, subdivisions (b)(5) and (b)(6), and Government Code section 6255. The copy cost has not yet been determined, because we are in the process of reevaluating our per-page copy cost. In the past, it has been 18.5 cents per page.

² In an email, you questioned whether such disclosure could have a deterrent effect on CPRA requests. Because the California Constitution recognizes privacy as an inalienable right, and because there is a legal right to file a reverse-CPRA action, we must provide notice to those whose constitutional rights are at stake. This is not a meaningless procedural hurdle; some reverse-CPRA actions have been successful. (See *Associated Chino Teachers v. Chino Valley Unified School Dist.* (2018) 30 Cal.App.5th 530.)

Leica 3D Scene Data (Release Conditioned on Ability to Redact)

The scene of the shooting was recorded using three-dimensional scanning from Leica Geosystems, which may be viewed with a no-cost Internet Explorer plugin from Leica Geosystems. We will need to determine first if it is possible to redact certain information (witness license plate numbers) in it. (Pen. Code, § 832.7, subd. (b)(5)(A).) Assuming that redaction is possible, it will be released in redacted form.

Photographs from Scene: Church Parking Lot

Photographs from the scene of the shooting will be released. Some will be redacted. (E.g., the license plate of every vehicle in the parking lot was photographed. All the license plate numbers would be redacted. (Pen. Code, § 832.7, subd. (b)(5)(A).))

Photographs from Scene: Victims' Home (Partial Release)

Prior to the fatal shooting, Merlin Factor reportedly vandalized the home shared by his ex-girlfriend, Erin H., and her boyfriend, Ben D. Photos which show the vandalism will be released, redacted as necessary to conceal personal information such as addresses. (Pen. Code, § 832.7, subd. (b)(5)(A).)

Photographs from Victims' Car

Merlin Factor was riding in Erin H.'s car when they were pulled over and Merlin Factor fought with deputies next to the car. Photos of the car will be released, with redactions made to the license plate and any other personal information related to Erin H. (Pen. Code, § 832.7, subd. (b)(5)(A).)

Photographs of Merlin Factor's Clothing

Due to an error with the disc, only six photos of Merlin Factor's clothing could be retrieved. They will be released.

Photographs of Erin H.

Photographs of Erin H., showing injuries reportedly inflicted by Merlin Factor, will be released in redacted form. (Pen. Code, § 832.7, subd. (b)(5)(A).)

Audio Files

There are numerous audio files associated with the case. They consist of belt recordings and formal, recorded interviews. They will be released in redacted form. (Pen. Code, § 832.7, subds. (b)(5)(A), (b)(5)(B), (b)(5)(C), (b)(6); Gov. Code, § 6255.)

Video Files (Partial Release)

There are two sets of video files in this case, both taken from security cameras at private establishments: those from a Walgreens store and those from an Arco gas station/AM-PM convenience store.

The Walgreens video briefly shows Merlin Factor and Erin H. That portion of it will be released, after redactions have been made. (Pen. Code, § 832.7, subds. (b)(5)(A), (b)(5)(B), (b)(5)(C), (b)(6); Gov. Code, § 6255.)

The rest of the video will not be released; it is one hour of people coming and going in the store (Merlin Factor and Erin H. are on less than fifteen minutes of it). The privacy rights of the individuals who happened to go to Walgreens that day outweigh any public interest in seeing video from when Merlin Factor and Erin H. were *not* at the store. (Pen. Code, § 832.7, subds. (b)(5)(A), (b)(5)(B), (b)(5)(C), (b)(6); Gov. Code, § 6255.)

The Arco/AM-PM videos are from sixteen cameras. Those inside the store do not show the shooting or anything related to it. Interior video will not be released; the privacy rights of the individuals in the AM-PM store outweigh any public interest in seeing video that has no relation to the shooting in question. (Pen. Code, § 832.7, subds. (b)(5)(A), (b)(5)(B), (b)(5)(C), (b)(6); Gov. Code, § 6255.) Some of the exterior cameras may have taken video that is relevant. If so, the relevant part will be released, after redactions. (Pen. Code, § 832.7, subds. (b)(5)(A), (b)(5)(B), (b)(5)(C), (b)(6); Gov. Code, § 6255.) Due to the number of videos and their length, the precise number of videos with relevant information has not yet been determined.

Records Which Will Not Be Released

State Summary Criminal History (aka "rap sheets") for Merlin Factor

Reason: Rap sheets are confidential and may only be disclosed to authorized parties. (Pen. Code, §§ 11076, 11105; *Younger v. Berkeley City Council* (1975) 45 Cal.App.3d 825, 832–833.)

Department of Motor Vehicles Information for Merlin Factor

Reason: DMV information is generally confidential and not subject to disclosure under the CPRA. (Gov. Code, § 6254.1, subd. (b); Veh. Code, § 1808.21.)

Autopsy Photographs of Merlin Factor

Reason: The autopsy report is being released with the police reports. The release of autopsy photographs, on the other hand, is prohibited except in certain circumstances which do not apply here. (Code Civ. Proc., § 129.) Separately, autopsy photographs are, by their nature, gruesome. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 754–755 (*Medina*); *People v. Marsh* (1985) 175 Cal.App.3d 987, 997–998 (*Marsh*).) While such photos are sometimes admitted as evidence, it is only after a court has weighed the probative value of the photographs against their potentially prejudicial effect. (*Medina*, at p. 755; *Marsh*, at pp. 997–998.) Public release of autopsy photos would not serve to further the public interest in records about misconduct or serious use of force by peace officers; the autopsy report itself suffices in this regard. (See Pen. Code, § 832.7, subd. (b)(5)(C).) Public release of

autopsy photographs can be traumatic for family and friends of the deceased. The public interest in the release of the photos is minimal, while the public interest in withholding is great. (Pen. Code, § 832.7, subds. (b)(5)(C), (b)(6); Gov. Code, § 6255.)

Photographs from Scene: Victims' Home (Partial Non-Release)

Reason: The photographs that show the vandalism attributed to Merlin Factor will be released, as previously noted. Other photographs from within the victims' home, which do not depict vandalism reportedly committed by Merlin Factor, will not be released. The victims' privacy interest in the interior of their home is clearly greater than any public interest in the release of the photographs, particularly since the shooting did not occur there. (Pen. Code, § 832.7, subds. (b)(5)(C), (b)(6); Gov. Code, § 6255.)

Video Unrelated to the Shooting Incident

As previously noted, most of the video from Arco/AM-PM and Walgreens does not show Merlin Factor, Erin H., or the deputies. The privacy interests of the ordinary people going to the store or a gas station, or working there, outweigh any public interest in video that is not relevant to the shooting. (Pen. Code, § 832.7, subds. (b)(5)(A), (b)(5)(B), (b)(5)(C), (b)(6); Gov. Code, § 6255.)

Audio of Witnesses Who Offered No Information

A number of potential witnesses were interviewed who could not or would not offer information in this case. That audio will not be released; the privacy interests of individuals who were not witnesses or who declined to be interviewed is greater than any public interest in such audio, which does little to further the public interest in understanding the shooting in this case. (Pen. Code, § 832.7, subds. (b)(5)(A), (b)(5)(B), (b)(5)(C), (b)(6); Gov. Code, § 6255.)

Projected Release Date

As noted on pages two and three, the deputies involved in this case must be given notice and an opportunity to file a reverse-CPRA action. Following the procedure employed in *Marken, supra*, 202 Cal.App.4th 1250, they will be given a month to do so. They and the Sheriff will be informed of our intention to release records to you and will be given copies of this letter. Assuming that we do not receive notice of a reverse-CPRA action by **November 26, 2019**, we will begin releasing records at that point.

We will initially release documents, which are the easiest to redact, after determining the copy cost and receiving payment. These records are originally in paper format, and will be released as such, after redaction.

The photo, audio, and video files are natively digital, as are the Leica Geosystems files. After redaction, they will be released in electronic format, through a method to be

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determined. (They will certainly exceed the 15 megabytes referenced in your original letter.)

Among the digital files I anticipate that photographs will be released first, as they are the simplest to redact. Audio and video would follow on a rolling basis, as we are able to cut and redact the audio and video files as I have outlined above. Release of Leica Geosystems data will depend on whether it is possible to redact personal identifying information.

Should a reverse-CPRA action be filed, we will delay release of records until the courts have conclusively determined what should and should not be released. If we receive notice of such a filing, you will be notified.

Respectfully,


Brent J. Schultze
Deputy District Attorney